IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

In re Forest Conservation Council, Inc., Friends of the Earth, Inc., and the American Bird Conservancy, Inc.	)	No. 03-1034
Petitioners.	)	

RESPONSE OF THE FEDERAL COMMUNICATIONS COMMISSION TO PETITION FOR WRIT OF MANDAMUS

INTRODUCTION

Petitioners seek a writ of mandamus from this Court in response to alleged "unreasonably delayed agency action" by the Federal Communications Commission ("FCC") with respect to the claimed threat communications towers pose to migratory birds. Because the FCC has not unreasonably delayed acting on the two migratory bird matters pending at the agency cited by petitioners – each matter has been pending for less than 18 months, and neither is subject to a statutory deadline – they are not entitled to the extraordinary relief of mandamus to compel agency action. The FCC therefore respectfully requests that the Court deny the petition for mandamus.

On March 31, 2003, in response to petitioners' mandamus request, this Court ordered the FCC to respond to the mandamus petition filed by petitioners, and directed the parties "to discuss in their responses the factors set forth in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984), for determining whether an agency's action has been 'unlawfully withheld or unreasonably delayed.'" In resolving petitioners' mandamus request, the Court's task is not to resolve the merits of

petitioners' claims; rather, the appropriate inquiry is whether the FCC's actions with respect to any of the four "administrative efforts" identified by petitioners, *see* Petition for a Writ of Mandamus ("Petition") at 14-16, constitute an unreasonable delay or failure to act.

Petitioners have taken a number of different actions to advance their views at the agency. They have participated in meetings held by the Fish and Wildlife Service ("FWS") Communications Tower Working Group, an informal collection of interested parties formed to develop research on the impact that communications towers may have on birds. In 2001, they threatened to sue the FCC. And they have participated, or attempted to participate, in a number of agency proceedings that are still pending at the FCC.

In none of the four matters cited by petitioners, however, has the FCC acted, or failed to act, in such a manner as to warrant mandamus. With respect to two of the matters – the claims made with respect to the Communications Tower Working Group and the April 2001 notice of intent to sue letter – there is nothing for the FCC to do, and there can accordingly be no undue delay. With respect to the two pending agency actions – proceedings on the August 2002 Gulf Coast petition and the application for review of the January 2002 Order issued by the Commercial Wireless Division before the Commission – neither petition has been pending for as long as even 18 months. That does not constitute unreasonable delay, especially when, as here, the agency faces no statutory deadline. Furthermore, applying all of the factors set out in *TRAC*, the request for mandamus should be denied because the extent of petitioners' claimed injury to

migratory birds is speculative, and the FCC has more substantial and pressing priorities that require immediate attention.

BACKGROUND

Communications towers and other structures that support antennas provide the infrastructure for services licensed by the Commission, including broadcast television and radio, cellular, Personal Communications Services (PCS), Specialized Mobile Radio Service (SMR), and other advanced and emerging services. Communications towers also are used for the provision of private radio services used by business and government, and for public safety purposes. Antenna structures that meet certain height and location criteria (generally towers more than 60.96 meters (200 feet) in height or located within certain distances of an airport, as specified in the Commission's rules) require notification to the Federal Aviation Administration (FAA)[1] and must be registered with the Commission prior to construction.[2] *See also* Response of Intervenors Cellular Telecommunications and Internet Association, *et al.*, at 3-6.

A. The Applicable Statutes And Regulations

Petitioners have asserted a number of broad substantive claims under three environmental statutes: the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*., the Endangered Species Act ("ESA"),16 U.S.C. §§ 1531 *et seq*., and the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 701 *et seq*.

[1] *See* 47 C.F.R. § 17.7; 14 C.F.R. § 77.13 (FAA rules on construction or alteration requiring notice).

[2] *See* 47 C.F.R. § 17.4(a).

1. The NEPA

As a federal agency, the FCC is required under "NEPA" to establish procedures to identify and account for the environmental impact of its major actions. *See* 42 U.S.C. § 4322. Among other things, NEPA created the Council on Environmental Quality ("CEQ") to oversee the environmental programs and activities of the federal government. CEQ, in turn, has promulgated rules that inform "federal agencies what they must do to comply with the procedures and achieve the goals of" NEPA. *See* 40 C.F.R. § 1500.1(a). Pursuant to the CEQ rules, each federal agency – including the FCC – issues its own rules implementing NEPA, which must comply with the requirements of the CEQ rules. *Id*. at § 1507.1.

The CEQ rules establish a three-tiered approach for implementing NEPA for "major federal actions," which CEQ has defined as "actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18.[3] The FCC has followed that approach in its rules implementing NEPA. *See* 47 C.F.R. §§ 1.1301-1.1319. First, "any Commission action deemed to have a significant effect upon the quality of the human environment requires the preparation of an" environmental impact statement. *In the Matter of Public Employees for Environmental Responsibility* ("*PEER*"), 16 FCC Rcd 21439, 21441 (para. 3) (2001) (explaining 47 C.F.R. § 1.1305); *see also Hill v. Norton*, 275 F.3d 98, 106 (D.C. Cir. 2001) ("The NEPA

[3] The regulations further provide that "(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; . . . (b) Federal actions tend to fall within one of the following categories: . . . (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities." 40 C.F.R. § 1508.18.

requires an EIS for any 'major Federal action[] significantly affecting the quality of the human environment'").

Second, "an action deemed potentially to have a significant environmental effect requires the preparation of an" Environmental Assessment ("EA"). *PEER,* 16 FCC Rcd at 21441 (para. 3) (explaining 47 C.F.R. §§ 1.1307(a), (b)). Third, "actions deemed individually and cumulatively to have no significant effect on the quality of the human environment are categorically excluded from environmental processing but in extraordinary cases may require the preparation of an EA." *Id*. (explaining 47 C.F.R. §§ 1.1306, 1.1307(c),(d)). With respect to this distinction, the Commission requires licensees and applicants initially to determine, in accordance with guidelines set out in the Commission's rules, whether construction of a proposed facility falls within a specified category of action requiring an EA, or whether it does not fall within such a category and therefore is categorically excluded.

In their mandamus request, petitioners assert that in order to comply with NEPA, the FCC is obligated to issue "a programmatic environmental impact statement (PEIS) concerning the impact of communications towers registered by the FCC on migratory birds and also [to] reform[] the agency's categorical exclusion policy . . ." Petition at 2.

2. The ESA

As this Court recently explained, the "ESA directs the Secretary of Interior to list fish, wildlife, or plant species that she determines are endangered or threatened." *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1064 (D.C. Cir. 2003). Under section 7 of the Endangered Species Act ("ESA"), "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized,

funded, or carried out by such agency . . . is not likely to jeopardize the continued existence" of any endangered species or threatened species or result in the "destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . ." 16 U.S.C. § 1536(a)(2). *See also Rancho Viejo*, 323 F.3d at 1064 (describing agency consultation process with FWS).

Licensees or applicants are required to file an EA with the agency when, among other reasons, proposed facilities may affect threatened or endangered species or designated critical habitats under the ESA. 47 C.F.R. § 1.1307(a)(3).[4] If an EA is required and endangered or threatened species or their critical habitats may be affected, the EA must utilize the best scientific and commercial data available. 47 C.F.R. § 1.1311(a)(6). With respect to actions that require the preparation of an EA under section 1.1307(a)(3), the Commission is to solicit and consider the comments of the FWS. 47 C.F.R. § 1.1308 Note.[5]

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[4] Section 1.1307(a) provides that "Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (see §§ 1.1308 and 1.1317) and may require further Commission environmental processing (see §§ 1.1314, 1.1315 and 1.1317): . . . (3) Facilities that: (i) May affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modifications of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973." 47 C.F.R. § 1.1307(a).

[5] The FCC's Office of General Counsel has issued a letter designating Commission licensees, applicants, tower companies and their representatives to act as non-federal representatives for purposes of consultation under section 7 of the ESA. The designation was made pursuant to 50 C.F.R. § 402.08. *See* Letter from Susan H. Steiman, Associate General Counsel, FCC, to Steve Williams, Director, U.S. Fish and Wildlife Service, U.S. Department of the Interior (April 10, 2002). A copy of the letter, along with other materials referred to in this response, are attached as exhibits to the response. *See* Attachment 1. The letter also is available on the FCC's website. *See* http://wireless.fcc.gov/siting/Migratorybirdsletter.pdf. In addition, the Commission's website provides guidance to applicants on the consultation that is required with FWS. *See* http://wireless.fcc.gov/siting/ea-deficiency-checklist2_1.pdf. *See* Attachment 2.

In their mandamus request, petitioners assert that the FCC has a statutory obligation to comply with the ESA "by consulting" with FWS "regarding the adverse impacts of its tower registration decisions" on migratory birds. Petition at 2, 11-12.

3. The MBTA

The MBTA is a criminal statute enacted in 1918 to implement a convention between the United States and Great Britain (on behalf of Canada) for the protection of migratory birds. *See Humane Society of the United States v. Glickman*, 217 F.3d 882, 883 (D.C. Cir. 2000).[6] Section 703 provides that ". . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . any migratory bird . . . included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds . . . ." 16 U.S.C. § 703. Under the FCC's environmental rules, effects on migratory birds may be considered under the catchall provisions for environmental impacts that are set out in sections 1.1307 (c) and (d).[7]

The Commission has acted under these catch-all provisions to address environmental matters, including matters involving migratory birds. *See*, *e.g.*, *In the Matter of County of Leelanau, Michigan*, 9 FCC Rcd 6901, 6903 (para. 8) (1994) (concluding that "the proposed Jurica tower . . . will not result in a significant loss of

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[6] The MBTA has since been amended to cover conventions with Mexico, Japan, and the former Soviet Union. *See Hill v. Norton*, 275 F.3d 98, 100-01 (D.C. Cir. 2001).

[7] Section 1.1307(c) provides that "[i]f an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth in detail the reasons . . . necessitating environmental consideration in the decision-making process." Then the "Bureau shall review the petition and consider the environmental concerns that have been raised," and if the "Bureau determines that the action may have a significant environmental impact, the Bureau will require the applicant to prepare an EA . . . ." 47 C.F.R. § 1.1307(c). Section 1.1307(d) provides that "[i]f the Bureau responsible for processing a particular action, otherwise categorically excluded, determines that the proposal may have a significant environmental impact, the Bureau, on its own motion, shall require the applicant to submit an EA." 47 C.F.R. § 1.1307(d).

migratory birds"); *see also, e.g.*, *In the Matter of Canyon Area Residents for the Environment Request for Review of Action Taken Under Delegated Authority on a Petition for an Environmental Impact Statement*, 14 FCC Rcd 8152, 8160 (para. 26) (1999) (because the "LCG tower will have less of an effect on historic sites than the numerous existing tower structures . . . CARE has not demonstrated . . . that the otherwise categorically excluded location for the proposed LCG tower may have a significant environmental effect under section 1.1307(c)").

Petitioners assert that the FCC has violated the MBTA through its authorization of the construction of communications towers that result in the "unintentional" and "inadvertent" death of birds. Petition at 13. They seek a writ of mandamus to require the agency to "minimize avian mortality" in order to comply with the MBTA. Petition at 2.

B. Procedural History

As detailed below, petitioners have taken a number of informal steps to advance their position with respect to communications towers and migratory birds. Only recently, however, have they participated or attempted to participate in proceedings at the FCC.

1. The Communications Tower Working Group

The FWS Communications Tower Working Group ("CTWG") was established in 1999 and "is composed of representatives of USFWS and other Federal and State government agencies [including the FCC], the telecommunications and broadcast industries, tower companies, research scientists and conservation organizations [including petitioner American Bird Conservancy, Inc.]." Petition, Exhibit W at 14. Its purpose is to "develop a research protocol," *see id.*, and it meets infrequently. *See*, *e.g.*, Petition,

Exhibit X, at 4 (noting in February 2002 first meeting "in over 18 months"). The CTWG is not a regulatory body, and does not have any independent regulatory authority.

2. April 2001 Notice Of Intent To Sue Letter

In April 2001, two of the petitioners – Friends of the Earth, Inc. ("FOE"), and the Forest Conservation Council, Inc. ("Forest") – filed with the FCC a 60-day notice of intent to sue under the ESA. Petition at 15.[8] Under the ESA, the agency is not obligated to respond to a notice of intent to sue letter. *See generally Murrelet v. Babbitt*, 83 F.3d 1068, 1072-73 (9th Cir. 1996) (explaining purpose of notice of intent to sue requirement).

3. The *PEER* Order

On December 5, 2001, the Commission issued its order in *PEER*, in which an organization known as Public Employees for Environmental Responsibility ("PEER") requested that the agency change its environmental rules as applied to, among other things, "radio spectrum requiring use of communications towers" and that it conduct a "'joint-rulemaking' with other federal agencies, as well as . . . a rulemaking to determine whether it should establish an 'Office of Environmental Compliance.'" 16 FCC Rcd at 21439 (para. 1). Although petitioners in this action were not the petitioners in *PEER*,

[8] A copy of the notice of intent to sue letter is attached to this Response as Attachment 3.

petitioners in both proceedings raise issues concerning the legal sufficiency of the Commission's environmental rules.[9]

The Commission denied PEER's requests. *Id*. It explained that the agency's environmental regulations comply with the applicable laws, and adequately protect the environmental interests cited by PEER. *See*, *e.g.*, *id*. at 21445 (para. 12) ("PEER also offers no rationale for treating all actions as actually or potentially damaging to the environment. We do not believe that the evidence of environmental harm proffered by PEER reflects any environmental processing failings by the Commission."). PEER filed a petition for reconsideration of the order in 2002, and that petition is currently pending before the FCC.

4. The FCC's 2002 Order In Response To Petitioners' Individual Antenna Structure Registration Challenges

In 2001, two of the petitioners in this action challenged a number of individual Antenna Structure Registrations ("ASR") applications. *See In the Matter of Friends of the Earth, Inc. and Forest Conservation Council, Inc.*, 17 FCC Rcd 201 (para. 1) (CWD 2002) ("*Friends of the Earth*"). The petitioners generally claimed, in response to each EA filing made by an applicant to register an antenna structure, that the filings were

[9] Specifically, PEER requested, first, that the FCC "require applicants for all Commission actions concerning . . . spectrum use requiring use of communications towers to file an EA for 'public utility' facility elements or an EIS for 'private utility' facility elements." *PEER*, 16 FCC Rcd at 21442 (para. 4). Second, PEER contended that the FCC's rules, "which allow applicants and others to certify whether or not proposed activities (e.g. . . . the construction of a communications tower) may significantly affect the environment, result in industry self-regulation, and that this process does not ensure compliance with NEPA and NHPA [the National Historic Preservation Act, 16 U.S.C. § 470 *et seq*.]." *Id*. (para. 5). Third, PEER argued that the Commission's environmental rules were obsolete due to the "'explosive growth' in wireline and wireless infrastructure since enactment of the Telecommunications Act of 1996," so that the FCC was obligated to reconsider its regulations in light of the "cumulative environmental effect[s]" of this development. *Id*. at 21442-43 (para. 6). Fourth, PEER contended that the FCC's categorical exclusion regime did not comply with NEPA. *Id*. at 21443 (para. 7). And finally, PEER asserted that "actions not requiring pre-construction authorization should be treated, for environmental review purposes, the same as those actions requiring pre-construction authorization." *Id*. at 21443 (para. 8).

deficient, so that the agency should not make the finding of no significant impact ("FONSI") necessary to approve the application. They also claimed that the Commission's rules did not properly implement the agency's NEPA obligations, improperly failed to consider the MBTA, and failed to comply with the ESA. *Id*. at 202 (para. 4). The petitioners also raised concerns about the "potential cumulative environmental effects of antenna structures" and contended that the FCC should, along with other federal agencies, "perform a series of nationwide studies, reports and consultations . . . to determine the effect of towers on migratory birds." *Id*. Finally, petitioners asserted that the FCC should prepare an EIS for its "antenna structure program." *Id*.

On January 4, 2002, the FCC, through an order issued by the Deputy Chief of the Commercial Wireless Division, dismissed these petitions to deny. *See Friends of the Earth*, 17 FCC Rcd 201. The FCC dismissed the petitions because the petitioners had not established standing to assert their various claims: "In the instant cases, the Petitioners have not alleged sufficient facts to demonstrate that the proposed applications would cause them to suffer an injury." *Id*. at 203 (para. 9).

The FCC explained that:

> [T]he Petitioners have filed global petitions against every application that appeared on consecutive public notices for seven weeks. Petitioners use the same cover letter for each Petition while merely changing the applicants' names and file numbers. The petitions contain virtually the same general allegations except for a few statements specific to only a few applications on each public notice. Upon reviewing the Petitions, we have not found any allegations, other than these general arguments, with respect to many of the applications.

Id. at 203-04 (para. 9). The Commission therefore concluded that "Petitioners do not show any traceable injury or provide the Commission with any documentation demonstrating that the construction of the individual antenna structures will result in damage . . . [and] do not show a direct link between the individual antenna structures and how the organization or its members will be aggrieved by the antenna structure." *Id*. at 204 (para. 10). The Commission also noted that many of petitioners' claims were directed at the agency's rules, and that such arguments would be properly made in a rulemaking proceeding. *Id*. at 205 (para. 14).

On January 30, 2002, petitioners filed an application for review before the Commission of the staff's order. That application is currently pending before the Commission. In addition, in the Spring of 2002, petitioners FOE and Forest challenged several other ASR applications.

5. The Pending August 2002 Gulf Coast Petition

On August 27, 2002, petitioners FOE and Forest filed a so-called Petition for National Environmental Policy Act Compliance ("Gulf Coast Petition") with the FCC. The petition seeks "an order mandating preparation of environmental assessments for 5,797 antenna structures in the Gulf Coast region harmful to migratory birds." Gulf Coast Petition at 2.[10] In particular, they assert that each antenna structure was built "in a manner inconsistent with" FWS guidelines and was "unlawfully registered by the FCC

[10] Petitioners subsequently amended their petition to request the preparation of EAs for a total of over 6000 antenna structures.

without environmental assessments" that petitioners claim are required by NEPA, CEQ regulations implementing NEPA, and the FCC's NEPA regulations. *Id*.[11]

Petitioners also request the preparation of an EIS with respect to the impact of antenna structures in the Gulf Coast region on migratory birds, and specifically request that the FCC suspend all future antenna structure registrations in the region until the EIS was prepared. *Id*. at 3. And they also seek in the petition "proper[] . . . public participation procedures for all future antenna structure registrations harmful to migratory birds in the Gulf Coast region." *Id*. The Petition for NEPA Compliance generated a number of responsive pleadings, and the matter is now pending at the agency.

ARGUMENT

A. The Standard For Obtaining Mandamus.

As this Court has explained, "[m]andamus is an extraordinary remedy, warranted only when agency delay is egregious." *In re Monroe Communications Corp.,* 840 F.2d 942, 945 (D.C. Cir. 1988). *See also Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976) (mandamus is a drastic remedy appropriate only in "extraordinary situations"); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1361 (D.C.Cir.1985) ("[m]andamus is an extraordinary remedy [and] we require similarly extraordinary circumstances to be present before we will interfere with an ongoing agency process."), *cert. denied*, 475 U.S. 1123 (1986). Mandamus relief is so rarely granted because an "agency has broad discretion to set its agenda and to first apply

[11] Petitioners also request an order "mandating supplementation of the environmental assessments accompanying . . . 96 antenna structures" because they failed "to disclose the direct, indirect, and cumulative impacts of the subject structures on migratory birds, or failed to conduct an adequate analysis." Petition for NEPA Compliance at 3.

its limited resources to the regulatory tasks it deems most pressing." *Cutler v. Hayes*, 818 F.2d 879, 896 n.150 (D.C. Cir. 1987).

In assessing whether an agency's delay in a particular case is so egregious as to warrant mandamus, this Court typically considers the factors set forth in *TRAC*, which provide "the hexagonal contours of a standard":

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

TRAC, 750 F.2d at 80 (citations omitted).

TRAC remains the governing authority with respect to the availability of mandamus in this Circuit. *See, e.g., In re United Mine Workers of America International Union*, 190 F.3d 545, 549 (D.C. Cir. 1999) ("[i]n exercising our equitable powers under the All Writs Act, we are guided by the factors outlined in" *TRAC* "for assessing claims of agency delay"); *see also Western Coal Traffic League v. Surface Transportation Board*, 216 F.3d 1168, 1174 (D.C. Cir. 2000) (citing *TRAC*). This Court has made clear, however, that it need not use the *TRAC* factors to analyze agency delay in cases where the agency has provided assurance that it is now "moving expeditiously" to resolve the issues in question. *TRAC,* 750 F.2d at 72, 80.

B. The FCC Has Not Egregiously Delayed Acting On The Petitions Raising Migratory Bird Issues Before The Agency Because The Petitions Have Been Pending For Less Than A Year-And-A-Half, And The Agency Is Under No Statutory Deadline.

Quite simply, the FCC has not egregiously delayed acting on the four "administrative efforts" cited by petitioners in their mandamus request. First, in none of the four matters was the agency required to act pursuant to or by a statutory deadline. The absence of such a deadline gives the agency great discretion in deciding what priorities to focus on and how to deploy its personnel and resources. *See*, *e.g.*, *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) (denying request for injunctive relief to conclude rulemaking where "[n]o statutory deadline limits the duration of rulemakings" and there was no "generalized congressional mandate for EPA to expedite").

Second, two of the four matters cited by petitioners – their efforts in the CTWG Working Group, and their service upon the agency of an intent to sue letter under the ESA – did not impose an obligation upon the agency to act. Indeed, the CTWG is not a regulatory body, and does not have any independent regulatory authority. Accordingly, the FCC was not required to act in response to any request or action taken by CTWG or made at one of its meetings.

Therefore, third, in determining whether the FCC has egregiously delayed acting on matters before it, the only relevant matters are the *Friends of the Earth* order, issued in January 2002 and now pending before the Commission on an application for review, and the Gulf Coast Petition, pending since August 2002. It is well-established, however, that an agency's failure to resolve matters pending for less than a year-and-a-half does not warrant mandamus.

In *TRAC*, for example, this Court concluded that delays of two and five years did not warrant mandamus. *TRAC*, 750 F.2d at 81. *Cf. Nader*, 520 F.2d 182, 206 (D.C. Cir. 1974) ("Although the issues are complicated, we can find no justification for a delay of *ten* years.") (emphasis added); *see also Wellesley v. Federal Energy Regulatory Comm'n*, 829 F.2d 275, 277 (1st Cir.1987) (delay of fourteen months not unreasonable). Applying the "rule of reason" factors set out in *TRAC*, the FCC has not egregiously delayed in not yet resolving the pending application for review or the pending petition, and therefore denial of the mandamus request is appropriate. The first two *TRAC* factors thus counsel strongly against mandamus here.

C. Applying The Remaining *TRAC* Factors, The Petitioners Have Not Established That They Are Entitled To Extraordinary Relief.

The remaining *TRAC* factors contemplate a balancing of the injury claimed by petitioners against the institutional priorities and resources of the agency. Essentially, petitioners contend that the claimed injury to migratory birds requires the FCC to reorder its priorities and move this environmental matter to the top of its list. But the petitioners do not claim an immediate threat to human health and welfare, and their claims of extensive injury to migratory birds are unsupported. Against this speculative injury, the FCC has more substantial and pressing priorities that require the immediate attention of its time and resources.

The FCC already has considered the utility of a programmatic environmental impact statement and concluded that such an EIS was not warranted given the current state of research with respect to communications towers and migratory birds. On March 21, 2000, then FCC-Chairman William Kennard denied a request by FWS Director Jamie Rappaport Clark that the FCC prepare a programmatic EIS "to delineate the potential

effect communications facilities may have on the migratory bird population and to institute appropriate mitigation measures."[12] In his letter, Mr. Kennard stated that "there is very little study and research, and thus no consensus within the scientific community, on the issue of what impact communications towers have on the migratory bird population and what, if any, mitigation measures could be effective." Attachment 2 at 1.[13]

Then-Chairman Kennard concluded in his March 2000 letter, "[u]ntil the necessary research and study is undertaken and some consensus is reached by the expert government agencies and scientific entities to determine the circumstances in which communications towers pose a risk to migratory birds, we do not believe it appropriate for the FCC to undertake the expansive, generic EIS effort you describe." *Id*. As detailed below, the FCC plans to act imminently to learn more about the extent of the threat communications towers may pose to migratory birds, and the current state of research on that subject.[14]

The exhibits to petitioners' mandamus request demonstrate that there is not much research into the nature and extent of the problems that communications towers may cause for migratory birds. More importantly, the supporting materials do not establish

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[12] *See* Attachment 4 at 1, March 21, 2000 Letter from William Kennard to Jamie Rappaport Clark.

[13] Then-Chairman Kennard's description of the existing research is confirmed by the American Bird Conservancy Report attached to the mandamus petition. *See* Petition, Exhibit W at 4 (noting that studies of bird kills at communications towers "conform to no overall protocol and have been conducted in a haphazard and sporadic manner").

[14] Even a leading official at FWS acknowledges that there is not much research on the threat communications towers pose to migratory birds. *See* Albert Manville, Office of Migratory Bird Management, U.S. Fish and Wildlife Service, Avian Mortality at Communications Towers, at 1 (describing many factors that kill birds, noting that "[w]hat the impacts of towers are to bird populations we simply don't know"), at 5 (stating "there isn't much" research on bird deaths at communications towers). A copy of Mr. Manville's remarks is at Attachment 5.

that there is an extensive or irreparable injury to migratory birds that could tilt the analysis under *TRAC* in their favor. *See, e.g., Levy v. Corcoran*, 389 F.2d 929, 930 (D.C. Cir.) (Tamm, J., concurring) ("I join in denying the application for the stay and the petition for writ of mandamus" because petitioner "cannot at this time show imminent, irreparable injury"), *cert. denied*, 389 U.S. 960 (1967).

For example, Petitioners aver that "[s]ome researchers believe the number of [deaths to migratory birds caused by communications towers] could be as high as *fifty* million deaths a year." Petition at 5 (emphasis in original). But the only support for this allegation is a brief declaration by Scott Somershoe, who acknowledges that "[w]e currently have little understanding of how migratory birds use coastal stopover habitat . . . ." Petition Exhibit N at para. 3. Mr. Somershoe then asserts, without explanation or citation to supporting documentation, that "[t]owers have been estimated to kill four to 50 million birds each year in the United States alone." *Id*. at para. 4.

Similarly, petitioners claim that a "single tower may kill thousands of birds in a single night." Petition at 8. The only source for this assertion, however, is a the Declaration of James Allan Cox, and the only supporting evidence is a single study calculating that approximately 38,000 birds were killed at one location over a 29-year period. Petition Exhibit E at para. 5. That averages out to about 1,300 bird deaths per year, or fewer than four per day.

The allegations in petitioners' mandamus request confirm the uncertainty as to the nature and extent of the migratory bird problem. For example, they assert that "FWS has confirmed that tower collisions have killed endangered red-cockaded woodpeckers." Petition at 11 (citing Exhibit W). That report, prepared by the American Bird

Conservancy, states that two red-cockaded woodpeckers were killed at a single unidentified tower. Other allegations of tower-related bird deaths also are speculative. *See*, *e.g.*, Petition at 11 ("Other species listed as threatened and endangered, such [as] the Kirtland's warbler, may be harmed in the Gulf Coast"); *see also id*. ("It is extremely likely that additional species are also killed, but the very minimal monitoring of tower collisions makes these deaths invisible").

In any event, there is no harm to justify mandamus in part because the FCC already has an EA requirement for endangered species in its existing regulations, as well as a NEPA process in place that when adopted was coordinated with CEQ to ensure compliance with their regulations. The existing regulations and procedures provide adequate measures for addressing the dangers communications towers pose for migratory birds.

Against the uncertain harm claimed by petitioners, the Court must consider other immediate priorities upon the FCC, which require the commitment of substantial time and resources. Among other things, the FCC needs to issue an order implementing its decision adopting rules concerning incumbent local exchange carriers' (incumbent LECs) obligations to make elements of their networks available on an unbundled basis to new entrants, and to conclude its pending media ownership proceeding. In addition, the Commission continues to take steps to promote the availability of advanced telecommunications capability, *see In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002), and to take further action with respect to the regulation of cable modem service, *see In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other*

Facilities, 17 FCC Rcd 4798 (2002). Finally, the FCC currently has a deadline of June 26, 2003, per 47 U.S.C. § 271, for resolving Qwest's application to provide long-distance service in Minnesota. Each matter is significant, complicated, immediately pressing and central to the Commission's statutory mission. The petitioners' claimed injury to migratory birds should not take priority over those matters, and does not warrant the extraordinary writ of mandamus.

D. The FCC Is Moving Expeditiously To Take Action With Respect To Migratory Bird Issues.

Although application of the *TRAC* factors demonstrates that the FCC has not egregiously delayed acting on the pending matters, this Court need not even reach the *TRAC* analysis because the FCC has imminent plans to devote more institutional time and effort to dangers communications towers may pose to migratory birds. This Court has stated that the *TRAC* factors are not necessary to analyze agency delay in cases where the agency has provided assurance that it is "moving expeditiously" to resolve the issues in question. *TRAC,* 750 F.2d at 72, 80.

On April 9, FCC Chairman Powell's senior legal adviser explained that "in the near future" the FCC would seek input on scientific evidence pertaining to the impact of communications towers on migratory birds. *See* Communications Daily, April 10, 2003, at 8.[15] In addition, he stated that the FCC would reach out to FWS and could obtain the services of a biologist as part of its efforts to address migratory bird issues. As the FCC gathers more information, it then will have a basis to decide whether to take any action with respect to its existing environmental regulations. Because the FCC is now moving expeditiously to gather more data on the migratory bird issue raised by petitioners, and

[15] *See* Attachment 6.

because that data needs to be evaluated before the agency takes any action with respect to the pertinent regulations, this Court need not analyze the *TRAC* factors and should simply deny the mandamus petition. *TRAC,* 750 F.2d at 72, 80.

CONCLUSION

For the foregoing reasons, the petition for mandamus should be denied.

Respectfully submitted,

John A. Rogovin
General Counsel

Daniel M. Armstrong
Associate General Counsel

Rodger D. Citron
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

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